and in the federal preemption action, is whether the federal statute preempts all State authority to regulate the rates charged by cellular carriers, including the authority to hear complaints about discriminatory rates, or merely the authority to set or determine the rates charged by cellular carriers. The Commission has previously concluded that it believes because Cellnet's complaint "involves allegations of unjust, unreasonable and discriminatory conduct, as well as cross-subsidization," it is "solidly grounded" in the provisions of the Ohio Revised Code, including, but not limited to Sections 4905.33 and 4905.35, Revised Code, and that "these provisions of the Ohio Revised Code were not affected nor preempted by adoption of [§332(c)(3)(A)]". Case No. 93-1785-TP-CSS, Entry on Rehearing (April 13, 1995). New Par continues to believe that the Commission's position on this issue is erroneous, and urges the Commission to reconsider its prior determination, and to dismiss the Amended Complaint on the grounds that the Commission's authority to adjudicate the complaint is preempted by §332(c)(3)(A). New Par urges the Commission to do so on the basis of the following points and authorities not previously brought to the Commission's attention.

Numerous court that have now interpreted §332(c)(3)(A) have found that it generally preempts state rate regulation in any form, not just the authority to set or determine rates.

GTE Mobilnet, v. Johnson, 111 F 3d. at 477-478. When it applied the abstention principles established in *Younger v. Harris*, it found them present, and held "the district court should have abstained from consideration of GTE's Mobilnet's and New Par's motion for relief. *Id* at 482. It reversed and remanded with instructions to the district court to dissolve the preliminary injunction, except as to the bundling issue, stating "[t]he Commission must be allowed to resolve this preemption question." *Id.*

See e.g., In re Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996); *Ponder v. GTE Mobilnet*, 1996 U. S. Dist. LEXIS 19562 (S.D. Ala. 1996); *Lee v. Contel Cellular of the South, Inc.*, 1996 U.S. Dist. LEXIS 19636 (S.D. Ala. 1996); *Metro Mobile Cts. of Fairfield County, Inc. v. Connecticut Department of Public Utility*, 1996 Conn Super. LEXIS 3326 (1996); *Hardy v. Claircom Communications Group, Inc.*, 937 F2d 1128, 1997 Wash. App. LEXIS 849 (1997); *Simons v. GTE Mobilnet, Inc.*, Civil Action No. H-95-5169 (S.D. Tex., April 11, 1996).[8] See also, *Iowa Utilities Board v. F.C.C.*, 1997 U.S. App. LEXIS 18183 at n. 21 (8th Cir., July 18, 1997) (holding that FCC has authority to promulgated pricing rules with respect to agreements between local exchange carriers and commercial mobile radio services providers because 47 U.S.C. §152(b) and §332(c)(3)(A) expressly preclude state regulation of rates charged by CMRS providers); *Wayne DeCastro v. AWACS, Inc. d/b/a Comcast Metrophone*, 935 F. Supp. 541 (D.N.J. 1996)(concluding that as evidenced by §332(c)(3)(A), "Congress intended federal law to exclusively govern rates charged by [CMRS] telecommunications providers."); *Storer Cable Co. v. City of Montgomery, Ala.*, 806 F. Supp. 1518 (M.D. Ala. 1992)(holding that a municipal ordinance which prohibited discriminatory or anti-competitive rates for the provision of cable television services was preempted by 47 U.S.C. §543, which generally provided that a State could not

[8]Copies of these unreported decisions are attached to the Motion of GTE Mobilnet to Dismiss, filed on July 7, 1997.

"regulate the rates for the provision of cable service except to the extent provided under this section.")[9]

The FCC has also determined that §332(c)(3)(A) curtails the state commissions' jurisdiction over complaint proceedings, except where such complaint proceedings "concern carrier practices *separate and apart from their rates*." *In the Matter of the Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Services*, 9 F.C.C. R. 1411 (1994) at ¶ 43 (emphasis added).

The FCC addressed this issue with even greater particularity in *In the Matter of the Petition of the People of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, Dkt. No. 94-105, Order on Reconsideration, 1995 FCC LEXIS 5309 (August 8, 1995). In that case, the FCC had denied a petition by the State of California to retain jurisdiction over the regulation of cellular rates pursuant to §332(c)(3)(A). A petition for reconsideration was filed by the Cellular Resellers Association, Inc. ("CRA"). The CRA complained in its petition for reconsideration that "the

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[9]The ordinance at issue in *Storer* mirrors Ohio Rev. Code §§ 4905.22, 4905.33 and 4905.35 and, like the Ohio statutes, was intended primarily to address anti-competitive pricing and price discrimination. The ordinance at issue in Storer and held to be a rate regulation provided:

> No rate established shall afford any undue preference or advantage among subscribers, but separate rates may be established for separate classes of subscribers and rates may reflect the increased cost of providing service to isolated or sparsely populated areas. In no event shall rates be established so low for any class of subscriber or for any geographic location as to prevent, discourage, restrict, or diminish competition in the furnishing of cable services.

Commission's decision to 'strip the CPUC [California Public Utilities Commission] of any authority to dispose of complaints involving discriminatory conduct with respect to intrastate service' will leave resellers without a forum for complaints." *Id.* at ¶16 (paragraph 16 is captioned, "Jurisdiction Over Intrastate Rate Complaints."). *See also Id.* at ¶40 ("CRA has asked for either reconsideration of our decision to deny the CPUC the authority to retain jurisdiction to dispose of reseller and other complaints concerning discriminatory intrastate cellular service rates, or in the alternative, a statement that this Commission 'will assume jurisdiction of such complaints and be prepared to dispose of them expeditiously.'"). Several opponents of CRA's petition for reconsideration argued that "CRA's request for an affirmation of the CPUC's authority to hear complaints regarding rate discrimination cannot be squared with the statutory framework", and "would effectively leave the CPUC with significant authority over rates, even though it was unable to meet the statutory test for the grant of such authority." *Id.* at ¶27. The FCC agreed with the opponents and denied the CRA's petition for reconsideration. *Id.* at ¶ 41. Thus, the FCC in rejecting both the Ohio and California petitions clarified that in its view the States' jurisdiction over complaints about discriminatory rates is preempted by §332(c)(3)(A) and outside the savings clause for other terms and conditions of service.

All the foregoing decisions are consistent in their support for the conclusion that §332(c)(3)(A) broadly preempts the States' authority to regulate rates, including the authority to entertain proceedings alleging that the rates charged by cellular providers are unreasonable or discriminatory, as well as the authority to approve rate increases. The Commission should

be not be reluctant to join in this view. Indeed it should be very reluctant to chart its own divergent course. The cellular industry is part of a national experiment, lead by the FCC, which has been charged by Congress "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 1040104, Purpose Statement, 110 Stat. 56 (1996). Each of the complaints Cellnet brings here echo complaints that it or other resellers have raised before the FCC, as long ago as 1981 and as recently as last year.[10] By

[10] The FCC has specifically addressed the cellular service provider's obligation to permit the resale of its service on at least four separate occasions. *See Cellular Communications Systems*, 86 FCC 2d 469 (1981); *In the Matter of Petitions for Rule making Concerning Changes to the Commission's Cellular Resale Policies*, 6 FCC Rcd 1719, *(Cellular Resale NPRM)* (1991) and 7 FCC Rcd 4006, Report and Order (June 8, 1992); *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Dkt. No. 94-54, *Cellular Resale Order* (July 12, 1996). The FCC addressed the sale of equipment by cellular service providers in *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 345, Final Decision (May 2, 1980), and determined that the sale of such equipment should not be regulated at all. *Id.* at ¶'s 158-161. The FCC has visited and revisited the practice of bundling service and equipment and has concluded that the public interest benefits in allowing bundling outweigh any disadvantages to resellers. *Second Computer Inquiry.*, 77 FCC 2d 345 at ¶'s 140 -160; *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, Report and Order (May 14, 1992). The practice of bundling was also addressed in the 1996 *Cellular Resale Order* at ¶ 31, and presently remains pending before the FCC as a result of a petition for reconsideration filed by AT &T. The FCC recently addressed roaming practices in CC Docket No. 94-54, *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio* Services, Second Report and Order and Third Notice of Proposed Rule making (August 15, 1996) *("Roaming Order")*. Prior to the issuance of this Report and Order, Cellnet filed comments in CC Dkt. No. 94-54 in which it raised the very same issue it is raising in this proceeding. (copy attached). The FCC has expressly taken jurisdiction over the issue raised by Cellnet, has sought further comment on this issue, and presumably will address it in its next report and order in this docket.

continuing to pursue such claims here, Cellnet is merely seeking to avoid the competitive experiment that is flourishing nationally and to preserve "regulatory litigation" in Ohio as it crutch against competition. *Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1988), 38 Ohio St. 3d 195, 197 (J. Douglas, dissenting). Allowing this action to linger or to proceed in not in the public interest.

CONCLUSION

For all the foregoing reasons, New Par requests that the Commission grant it motion to dismiss the Amended Complaint.

Respectfully submitted,

Kathleen M. Trafford (0023175[illegible])
Porter, Wright, Morris & Arthur
41 S. High Street, 29th Floor
Columbus, Ohio 43215
(614) 227-1915

Attorney for New Par,
dba AirTouch Cellular

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing New Par Motion to Dismiss the Amended Complaint has been served upon the following counsel of record by regular U. S. mail, postage prepaid, this 12th day of August, 1997.

Jon F. Kelly, Esq.
Legal Department
Ameritech Ohio
150 East Gay Street, Room 19-S
Columbus, OH 43215

Charles S. Rawlings
2639 Wooster Road
Rocky River, Ohio 44116

Thomas E. Lodge
Thompson, Hine & Flory
10 West Broad Street, Suite 700
Columbus, Ohio 43215-3435

Randy J. Hart
Hahn, Loeser & Parks
3300 BP America Building
200 Public Square
Cleveland, Ohio 44114-2301

James B. Niehaus
THOMPSON, HINE & FLORY
3900 Key Center
Cleveland, Ohio 44114-1216

Stephen M. Howard
Vorys, Sater, Seymour and Pease
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

Kathleen M. Trafford

Kathleen M. Trafford

COLUMBUS/0356518.03

HAHN LOESER·PARKS LLP

FAX TRANSMISSION

3300 BP America Building
200 Public Square
Cleveland, Ohio 44114-2301

Telephone: 216-621-0150
Facsimile: 216-241-2824
Cleveland ▲ Columbus

FROM:	**Randy J. Hart, Esq.**	Number of Pages: (including this page)	32
DATE:	August 14, 1997	Client Code:	75782-3
SUBJECT:	Cellnet v. AirTouch	SEND BY:	ASAP

TO:	Facsimile Number:	Confirmation No:
Mr. Mike Tricarichi	**765-0885**	**765-1524**

SENDER'S COMMENTS:

New Par's Motion to Dismss the Amended Complaint attached.

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ELECTRONIC CITATION: 1997 FED App. 0137P (6th Cir.)
File Name: 97a0137p.06

Nos. 95-4358/4359; 96-3025

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GTE MOBILNET OF OHIO; OHIO RSA #3; GTE MOBILNET INCORPORATED,
Plaintiffs-Appellees/ Cross-Appellants (96-3025),

NEW PAR; NORTHERN OHIO CELLULAR TELEPHONE COMPANY; AKRON CELLULAR TELEPHONE COMPANY; CANTON CELLULAR TELEPHONE COMPANY; COLUMBUS CELLULAR TELEPHONE COMPANY; LORAIN/ELYRIA CELLULAR TELEPHONE COMPANY; CELLULAR COMMUNICATIONS OF MANSFIELD; AIRTOUCH CELLULAR OF OHIO, formerly known as Pactel Cellular of Ohio; CELLULAR COMMUNICATIONS INCORPORATED,
Plaintiffs-Appellees,

v.

ON APPEAL from the United States District Court for the Southern District of Ohio

DAVID W. JOHNSON, Commissioner of Ohio, *Defendants-Appellants/Cross-Appellees (95-4359),*

ROWESTSIDE CELLULAR, INC., doing business as RTMCellnet, *Intervenor-Appellant/Cross-Appellee (95-4358).*

RICHARD M. FANELLY; JOLYN BARRY BUTLER, Commissioners, Public Utilities Co

Decided and Filed April 18, 1997

Before: SUHRHEINRICH, DAUGHTREY, and GIBSON, Circuit Judges.*

JOHN R. GIBSON, Circuit Judge. The Commissioners of the Public Utilities Commission of Ohio[1] and Westside Cellular, Inc., which does business as Cellnet, appeal a preliminary injunction prohibiting the Commission from exercising jurisdiction over the aspects of Cellnet's complaint alleging that GTE Mobilnet and the New Par Companies engaged in discriminatory and anti-competitive conduct. The injunction also prohibited the Commission

*The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

[1]The Commissioners include: David W. Johnson, Ronda Hartman Fergus, Richard M. Fanelly, and Jolyn Barry Butler.

from attempting, in any other way, to exercise control over the cellular rates charged by GTE Mobilnet and the New Par Companies. The district court ruled that 47 U.S.C. § 332(c)(3)(A) (1994) expressly preempted the Commission from considering Cellnet's complaint because Cellnet sought relief requiring the Commission to regulate rates, but the district court allowed the Commission to retain jurisdiction over issues involving the bundling of services and products. The Commission and Cellnet argue that the district court erred both in concluding that federal law preempted their claims, and in failing to abstain from considering the issues before the Commission. GTE Mobilnet cross-appeals, arguing that the district court misunderstood the meaning of the term "bundling" and that Ohio law does not permit the Commission to regulate bundling. We affirm the district court's decision with respect to the cross-appeal, and reverse in all other respects, concluding that under *Younger v. Harris*, 401 U.S. 37 (1971), the district court was required to abstain, and direct the district court to dissolve the injunction against the Commission in order to allow the Commission to resolve the preemption issue.

GTE Mobilnet[2] and the New Par Companies[3] ("New Par") operate cellular telephone networks and sell cellular telephone services. These cellular service providers are "telephone companies" and "public utilities" for purposes

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[2]GTE Mobilnet of Ohio Limited Partnership, Ohio RSA #3, and GTE Mobilnet Inc. collectively are referred to as GTE Mobilnet.

[3]New Par, Northern Ohio Cellular Telephone Company, Akron Cellular Telephone Company, Canton Cellular Telephone Company, Columbus Cellular Telephone Company, Lorain/Elyria Cellular Telephone Company, Cellular Communications of Mansfield, AirTouch Cellular of Ohio, formerly known as PacTel Cellular of Ohio, Inc. and Cellular Communications, Inc. are collectively known as New Par. These companies do business in Ohio under the trade name CellularOne.

of applicable provisions of Ohio Utility Law, Ohio Revised Code Title 49. In addition, the cellular telephone service provided by GTE Mobilnet and New Par is a "commercial mobile service" under the Federal Communications Act, as amended in 1993 by the Omnibus Budget Reconciliation Act of 1993, which subjects these companies to treatment as "common carriers" and submits them to the jurisdiction of the Federal Communications Commission pursuant to 47 U.S.C. § 332(c)(1)(A). Cellnet is a wholesale customer of New Par and resells cellular telephone services to end-users, the customers who actually use the services.

Cellnet filed a complaint before the Ohio Commission against GTE Mobilnet and New Par[4] alleging several violations of Ohio law and the Commission's several orders concerning practices by cellular telephone service providers. The preemption arguments before us require a detailed discussion of Cellnet's complaint.

In its complaint Cellnet alleged that GTE Mobilnet and New Par: (1) did not maintain separate wholesale and retail operations or accounting records, but instead kept interrelated records;[5] (2) refused to provide cellular service to Cellnet at the same rates, charges, and conditions under which each provided service to their retail functions, and instead charged Cellnet at a higher rate;[6] (3) provided affiliated resellers, but not Cellnet, with a number of non-monetary benefits that substantially reduced the cost of

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[4]Cellnet also named as parties companies that do not appeal: Ameritech Mobile Communications, Inc., Youngstown Cellular Telephone Company, and Cellular Communications, Inc.

[5]This allegedly violated a Commission order and Ohio Revised Code section 4905.54.

[6]This allegedly violated a Commission order and Ohio Revised Code sections 4905.22, 4905.33, and 4905.35.

service to the affiliated resellers, which was unfair and unreasonable to Cellnet;[7] (4) cross-subsidized their retail operations, which they failed to keep separate from their wholesale operations, with profits generated by their wholesale functions, which enabled their retail operations to provide service to the public at lower than actual cost with the purpose of destroying competition;[8] (5) offered retail rate plans which charged rates below those contained in their tariffs, and below the rates made available to Cellnet;[9] (6) had entered into agreements concerning roaming[10] among themselves that were discriminatory pricing schemes that disadvantaged Cellnet and resulted in a loss of revenue to it.[11]

Finally, Cellnet complained that these alleged actions had placed it at a disadvantage in the marketplace and had prevented it from competing in a number of markets served by GTE Mobilnet and New Par. Cellnet claimed that the discriminatory treatment had caused it to lose money,

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[7]This allegedly violated a Commission order and Ohio Revised Code sections 4905.22, 4905.33, and 4905.35.

[8]This allegedly violated Ohio Revised Code sections 4905.22, 4905.33, and 4905.35.

[9]This allegedly violated a Commission order and Ohio Revised Code sections 4905.33, 4905.35, and 4905.54.

[10]A cellular telephone user roams when he or she travels out of the area served by his or her carrier.

[11]This allegedly violated Commission orders and Ohio Revised Code sections 4905.22, 4905.33, 4905.35, and 4905.54. In addition, Cellnet contended that Northern Ohio Cellular Telephone and Youngstown Cellular Telephone Company had increased their roaming rates without filing for an increase as required by Ohio Revised Code section 4909.18.

which slowed down its entrance into certain markets. Under GTE Mobilnet's practice of charging Cellnet more than the amount charged to GTE Mobilnet's and New Par's affiliated resellers, Cellnet had suffered and continued to suffer severe economic damage.

Cellnet asked the Commission to find that GTE Mobilnet and New Par had violated Commission orders and Ohio law, and therefore order GTE Mobilnet and New Par: (1) to separate their wholesale and retail functions; (2) to maintain separate accounting records for those operations; (3) to stop cross-subsidizing the retail operations with wholesale profits; (4) to provide service to Cellnet at the rates, terms, and conditions that they provide to their own affiliated retail functions; (5) to submit annual audits to verify their compliance; and (6) to compensate Cellnet for damages suffered by Cellnet as a result of these violations.

After filing the complaint, Cellnet attempted to obtain discovery from GTE Mobilnet and New Par. GTE Mobilnet and New Par, however, moved for dismissal, arguing that federal law preempted the Commission's authority to hear the case. The Commission denied their motion to dismiss.

GTE Mobilnet and New Par filed this action for injunctive relief in federal district court, arguing that the relief Cellnet sought would require the Commission to regulate rates and, therefore, that 47 U.S.C. § 332(c)(3)(A) facially preempted Cellnet's claims and thus preempted the Commission's authority to hear the case.

The district court granted a preliminary injunction on the grounds that GTE Mobilnet and New Par had established a likelihood of success on the merits of the preemption claim and that the parties had also satisfied the other elements required for the grant of a preliminary injunction.

The terms of 47 U.S.C. § 332(c)(3)(A) were central to the district court's consideration of the preemption issue

and also to ours.[12] This section was passed in 1993, amending the Federal Communications Act to preempt state authority to "regulate the entry of or the rates charged" by commercial mobile services. The statute, however, allows states to continue "regulating the other terms and conditions" of commercial mobile services. Subsection (i) of the statute provides that states can petition the FCC for permission to re-regulate rates where market conditions fail to protect subscribers adequately from unjust or unreasonably discriminatory rates. At issue in the case before us is whether the relief Cellnet requested required the Commission to regulate the rates charged. If so, section 332 would preempt the Commission's authority to adjudicate the complaint.

In considering the statute, the district court looked to the statute on its face and then turned to the legislative history, and concluded that section 332 did not preempt the Commission from considering bundling claims. The court observed, however, that most of Cellnet's complaint did not involve bundling claims, and then considered the rest of Cellnet's complaint.

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[12]Section 332(c)(3)(A) states in part:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. . . . Notwithstanding the first sentence of this subparagraph, a State may petition the [Federal Communications] Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that --
>
> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;
> . . . .

Cellnet and the Commission argued that requiring GTE Mobilnet and New Par to charge affiliated and unaffiliated resellers the same price was not a form of rate-setting, but instead a type of action over which the Commission had jurisdiction. The district court rejected this argument, reasoning that if Congress had intended automatically to reserve to the states the authority to control discriminatory rates, Congress would not have included in the statute subsection (i), which allowed a state to petition for authority to re-regulate rates when the rates are unreasonably discriminatory. The court concluded, therefore, that the plain language of the statute reflected Congress's clear intent to preempt the states from controlling discriminatory rates. The FCC had not granted the Commission the authority to re-regulate discriminatory rates under subsection (i), therefore the district court held that section 332 preempted the Commission from considering Cellnet's complaint. Thus, GTE Mobilnet and New Par had demonstrated a substantial likelihood of success on the merits of their preemption claim.

After discussing issues of retroactivity, ripeness, and whether the statute created a private right of action, issues we need not consider because they are not relevant to our reasoning, the district court turned to the Commission's and Cellnet's abstention arguments. The court determined that abstention under neither *Younger v. Harris*, 401 U.S. 37 (1971), nor under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), applied to this case because section 332(c)(3)(A) "unequivocally preempt[ed]" the state's authority to regulate cellular rates.

On appeal, Cellnet and the Commission argue that the district court erred in numerous respects. The most significant argument, however, is that the district court should have abstained under *Younger* and *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). GTE Mobilnet and New Par contend that the district court properly issued the preliminary injunction, and properly declined to abstain because the federal statute facially

preempts state law. GTE Mobilnet cross-appeals, arguing that the district court erred in determining that the Commission may exercise jurisdiction over Cellnet's claims relating to the bundling of services and equipment.

I.

We review de novo questions of law relevant to a district court's grant of a preliminary injunction. *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir.), *cert. denied*, 117 S. Ct. 49 (1996). Questions of federal preemption of state law generally are considered questions of law subject to de novo review. *See Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1299 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990).

The district court's injunction based upon preemption brings us directly to the interplay between preemption and abstention that we have articulated in a number of our decisions. In *CSXT, Inc. v. Pitz*, 883 F.2d 468, 472-74 (6th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990), and *Federal Express Corp. v. Tennessee Public Service Commission*, 925 F.2d 962, 967-68 (6th Cir.), *cert. denied*, 502 U.S. 812 (1991), we held that when state and federal courts have concurrent jurisdiction to decide preemption questions, a federal court should abstain to allow the state court to consider the preemption issues. We added a proviso to the rule, however, in *Bunning v. Commissioners of Kentucky*, 42 F.3d 1008, 1011 (6th Cir. 1994), and *Norfolk & Western Railway Co. v. Public Utilities Commission*, 926 F.2d 567, 593 (6th Cir. 1991), when we held that if the issues present facially conclusive claims of federal preemption, we will not abstain, but instead will decide the preemption question.

It is the application of these four decisions that controls whether the district court erred in its resolution of the preemption issue in light of the abstention arguments. In consideration of whether we should abstain, therefore, our

analyses must center on whether the issues before us present facially conclusive claims of federal preemption.

A.

In *Younger* the Supreme Court determined that federal courts should not enjoin pending state criminal proceedings started before the filing of a federal suit, except in the unusual situation where an injunction is necessary to prevent immediate and irreparable injury. 401 U.S. at 43-54. The policies behind *Younger* include the notion of comity, in which courts consider the interests of both state and federal governments. Before deciding whether federal law preempts state law, a federal court must consider carefully whether it should abstain to allow the state court to resolve the preemption question.

In *CSXT*, a federal district court restrained a state agency from enforcing a state rule requiring railroads to furnish toilets in locomotives, because the court concluded that two federal acts preempted the state agency from enforcing the rule. 883 F.2d at 470. The state agency appealed on abstention grounds. *Id.*

On appeal, we held that the fact that this was a preemption case, rather than another type of federal question case, should not modify the manner in which we consider the appropriateness of abstention. *Id.* at 471. We looked at both of the federal acts at issue, and decided that neither act prohibited concurrent state regulation. *Id.* Because there was no grant of exclusive jurisdiction to the federal courts to resolve federal railroad safety questions or preemption claims in the area of railroad safety, we determined that state courts did not lack jurisdiction over questions of railroad safety or preemption claims. *Id.* at 472. "State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute." *Id.* We concluded that a federal court need only consider two questions: "whether the state court has concurrent judicial jurisdiction to decide the preemption

question and, if the answer to that question is 'Yes,' whether a federal court should abstain in favor of ongoing state proceedings originating in the state regulatory agency." *Id.* at 473-74. Having concluded that the state court had concurrent jurisdiction, we then moved on to consider *Younger* abstention and held that it was appropriate. *Id.* at 474-75.

In *Federal Express*, we followed *CSXT* closely. In *Federal Express*, an ALJ determined that FedEx was a motor carrier under Tennessee law, and required FedEx to comply with Tennessee law. 925 F.2d at 964. A federal district court dismissed on abstention grounds FedEx's action seeking declaratory and injunctive relief, rejecting FedEx's argument that federal law preempted Tennessee law. *Id.* at 964-65. FedEx appealed, arguing that abstention was inappropriate here because the federal act "absolutely prohibit[ed]" state regulation. *Id.* at 967. FedEx attempted to distinguish *CSXT* because here preemption was "clear", whereas in *CSXT*, there was no clear resolution of the preemption question. *Id.* at 968. We determined that FedEx had failed to distinguish *CSXT*, and because the federal act did not suggest that federal courts had exclusive jurisdiction to resolve the preemption question, we held that Tennessee courts had concurrent jurisdiction to consider the preemption question. *Id.* We then considered whether we should abstain under the *Younger* doctrine, and we held that we should. *Id.* at 968-70.

GTE Mobilnet and New Par argue, however, that under *Bunning* and *Norfolk*, it is not necessary for this court to consider whether to abstain because the federal statute facially preempts state law.

In *Bunning*, Congressman James Bunning conducted a poll, financed by a federal political committee, related to his recent election. The chairman of Kentucky's Democratic Party filed a complaint before the Kentucky Registry of Election Finance against Bunning, alleging that

he had used the poll to assess his potential as a future gubernatorial candidate in violation of Kentucky's campaign finance laws. *Bunning*, 42 F.3d at 1009. Thereafter a federal district court held that the Federal Election Campaign Act preempted state law and enjoined the Registry from taking further action on the complaint against Bunning. *Id.*

The Registry appealed on abstention grounds. *Id.* at 1011. We observed that the federal act included an express preemption clause which stated that the Act or rules prescribed under it "supersede and preempt any provision of State law with respect to election to Federal office." *Id.* at 1012 (quotations omitted). We next determined that an interpretive regulation, promulgated pursuant to the federal law at issue, specified that federal law superseded state law concerning the expenditures by political committees. *Id.* We concluded that because it was undisputed that a federal political committee paid for the poll, the federal law and interpretive regulation clearly preempted the state law. *Id.* at 1011-12. We therefore affirmed the district court's holding that it was not required to abstain because the case presented facially conclusive claims of federal preemption. *Id.*

In *Norfolk*, a state agency appealed a district court decision enjoining it from enforcing an Ohio rule requiring a railroad to maintain a walkway on its railroad bridges because a federal statute preempted the Ohio rule. 926 F.2d at 569. On appeal, we considered whether the federal statute, which excluded states from legislating in any area of railroad safety already "covered" by regulations adopted by the Secretary preempted Ohio's rule. *Id.* at 570. Until the Secretary adopted a rule covering a certain subject matter, however, states could continue regulating within that subject matter. *Id.* Here, however, the Secretary had considered and rejected a bridge walkway rule. We therefore concluded that the federal statute negatively preempted Ohio's rule because the Secretary had covered the subject matter. *Id.* at 570-71.

In considering the agency's abstention arguments, we emphasized that abstention was "not required when the naked question, uncomplicated by ambiguous language, is whether the state law on its face is preempted." *Id.* at 573. In addition, we observed that "facially conclusive" claims of federal preemption may be sufficient to support federal jurisdiction where *Younger* abstention may be otherwise appropriate. *Id.* We concluded, "Because this case present[ed] a facially conclusive challenge to [the Ohio] rule and does not involve interpreting state law or making findings on disputed facts, the considerations that require abstention are not present." *Id.*

B.

The central question before us today is whether section 332 presents a facially conclusive challenge to the Commission's authority to adjudicate Cellnet's complaint. If so, we need not abstain. If the preemption claim is not facially conclusive, however, we should consider abstaining to allow the Commission to resolve the preemption issue.

1.

We interpret a statute as a whole to determine whether it presents a facially conclusive preemption claim to Cellnet's action. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986). Significantly, the district court paid little heed to the provisions of Ohio law and whether the state law at issue fell within the federal sphere of rate regulation. Where the scope of preemption is at issue, a court must consider whether the state law falls within the area of federal preemption. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306-10 (1988).

On its face, the preemptive reach of section 332 is limited. The statute preempts states from regulating market entry and rates charged, but specifically allows states to regulate "other terms and conditions" of service. The House report provides a list of examples of matters that fall within the phrase "other terms and conditions," but

specifies that the list is "illustrative only and not meant to preclude other matters as fall within a state's lawful authority." H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588. Thus our inquiry must focus on whether Cellnet's complaint requires the Commission to regulate market entry or rates charged, or whether it falls into the sphere of "other terms and conditions."

Cellnet's complaint alleges several violations of Ohio law and Commission orders, that together are intended to ensure that the services provided by cellular carriers operate in a fair and nondiscriminatory manner. The laws allegedly violated include the following: section 4905.22, which provides that public utilities shall not assess unjust, unreasonable, or unfair charges; section 4905.26, which provides for a hearing when a complaint is filed against any public utility alleging that the utility's charges are unjust and unreasonable; section 4905.33, which prohibits utilities from charging any person or corporation a greater or lesser charge than it charges another person or corporation for a like service, and from providing service at less than actual cost for the purpose of destroying competition; section 4905.35, which prohibits a public utility from giving any undue or unreasonable advantage or disadvantage to any person or corporation; section 4905.54, which mandates that every public utility shall comply with Commission orders and regulations; and section 4909.18, which requires public utilities desiring to establish or change any charges to file an application with the Commission.

Under these laws Cellnet made allegations in its complaint which we have outlined above in detail. *See supra* at 4-6. In substance, Cellnet alleged that GTE Mobilnet and New Par did not keep their wholesale and retail operations separate; refused to charge Cellnet at the same rates and conditions that they charged their retail functions, instead charging Cellnet more; provided non-monetary benefits to affiliated resellers that were not

offered to Cellnet; cross-subsidized their retail operations with profits from their wholesale functions; offered corporate plans which charged rates below those contained in their tariffs and below the rates made available to Cellnet; and violated state laws concerning roaming charges.

The complaint attacked the preferential manner in which GTE Mobilnet and New Par treated their retail affiliates, compared to the way they treated Cellnet, an unaffiliated company.[13] Cellnet argues that Ohio law is indifferent to the amount a cellular service provider charges for its services, but is concerned about the methods in which the services are provided because Ohio law prohibits discriminatory or anti-competitive methods and means of providing services. Under Ohio law, it makes no difference if the rate charged is two cents a minute or twenty dollars a minute, as long as affiliated resellers are charged at the same rates as unaffiliated resellers. Because Cellnet does not care what rate it is charged, but only that it is charged at the same rate, terms, and conditions that affiliated resellers are charged, Cellnet argues that its complaint does not ask the Commission to regulate rates, but only to prohibit discriminatory conduct that violates Ohio law. GTE Mobilnet and New Par answer that, though the relief sought by Cellnet will not require the Commission to set rates, it unquestionably will result in the Commission regulating rates charged.

We cannot conclusively determine whether the language of section 332 refers to simply setting rates or whether it refers to any type of adjustment to rates, no matter how indirect. We cannot therefore conclude, as in *Norfolk* and *Bunning*, that the federal law presents "facially conclusive" claims of preemption of the Ohio law at issue. *See*

[13]For example, the complaint alleges that rate plans are made available to affiliated and unaffiliated resellers in a discriminatory manner that violates the Ohio Code.

Norfolk, 926 F.2d at 573. In fact, to decide this preemption issue would require us to enter into a detailed analysis of state law, a task in which we will not engage. *See id.* We thus conclude that the state law Cellnet alleges GTE Mobilnet and New Par violated does not fall within the area facially preempted by section 332.

Total T.V. v. Palmer Communications, Inc., 69 F.3d 298 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1459 (1996), a case dealing with statutes similar to both the federal statute and the Ohio provisions at issue, supports our conclusion that section 332 does not present a facially conclusive challenge preempting the Commission from adjudicating Cellnet's complaint. In *Total T.V.*, the Ninth Circuit held that a federal statute expressly preempting state regulation of cable television rates did not prevent a cable television operator from bringing an action in state court, alleging that a competitor was engaging in below-cost predatory pricing with intent to destroy competition. *Id.* at 301. The court reasoned that the state law was not preempted because the California statute at issue in *Total TV* only prohibited below cost pricing for anti-competitive reasons and did not directly regulate rates. So long as competitors did not act with discriminatory purpose, they could charge any rate they pleased. *Id.* at 301-02. Likewise, Cellnet argues its complaint is directed at GTE Mobilnet's and New Par's discriminatory and anti-competitive conduct and not at the actual rates charged. *See also Cable Tel. Ass'n v. Finneran, Inc.*, 954 F.2d 91 (2d Cir. 1992) (state law restricting cable companies from imposing charges when a customer wants to downgrade his or her cable service to a less expensive cable package not preempted by federal law that prohibited states from regulating rates charged by cable companies).

In sum, we cannot conclude that section 332 presents a facially conclusive challenge to preempt the Commission from adjudicating Cellnet's complaint.